

Indian Child Welfare Act (“ICWA”) Requirements

<p>Applicability (25 USC § 1911(d); CRC 1439(b))</p> <p>ICWA applies to any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, including all proceedings under Welfare and Institutions Code §300 et seq., and to §§601 and 602 et seq. when the child is in foster care or at risk of entering foster care. An Indian child is an unmarried person under the age of 18 who is a member of an Indian tribe or is eligible for membership in an Indian tribe and is a biological child of a member of an Indian tribe. A determination by a tribe or Bureau of Indian Affairs (BIA), absent a determination by a tribe to the contrary, that a child is or is not a member or eligible for membership in the tribe is conclusive.</p>
<p>Inquiry (CRC 1439(d))</p> <p>The social worker or probation officer must ask the child and the parents or legal guardians at removal or as soon as possible thereafter whether the child may be an Indian child or may have Indian ancestors and must record the information, if applicable, on the petition. At their first court appearance, the parent or guardian must be ordered to complete <i>Parental Notification of Indian Status</i> (form JV-130).</p>
<p>Intervention (25 USC § 1911(c); CRC 1412(i))</p> <p>An Indian child, Indian custodian or Indian guardian, and Indian child’s tribe have the right to intervene at any point in the proceeding.</p>
<p>Right to Counsel (25 USC § 1911(d); CRC 1412(g)(h), 1439(h))</p> <p>The parent, Indian custodian, or Indian guardian has the right to court-appointed counsel.</p>
<p>Notice (25 USC § 1912(a); CRC 1439(f))</p> <p><u>When:</u> <u>Dependency:</u> Prior to Detention hearing. Emergency removal orders may be required. <u>Delinquency:</u> Prior to Disposition hearing ordering placement.</p> <p><u>How:</u> Party seeking foster care placement or termination of parental rights must notify the parent and Indian custodian or Indian guardian, and the Indian child’s tribe, of the pending proceedings and the right of the Tribe to intervene in the following way:</p> <ol style="list-style-type: none"> 1. Notice must be sent registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended. The return receipt must be filed in the court file. 2. Notice to the tribe must be to the tribal chairman unless the tribe has designated another agent for service. 3. Notice must be sent to all tribes of which the child may be a member or eligible for membership. 4. If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice must be sent to the specified office of the Secretary of the Interior. 5. Notice must be sent whenever there is reason to believe the child may be an Indian child for every hearing unless and until it is determined that the child is not an Indian child. 6. If, after a reasonable time not less than 60 days following the sending of notice, no determinative response to the notice is received, the court may determine that ICWA does not apply to the case unless and until further evidence is received that ICWA applies. 7. If an Indian child’s tribe has exercised its right to intervene after receiving <i>Notice of Involuntary Child Custody Proceedings for an Indian Child (Juvenile Court)</i> (form JV-135), subsequent notices may be sent as to all other parties.
<p>Examples of Probable Cause to Believe the Child Is an Indian Child (CRC 1439(d))</p> <ol style="list-style-type: none"> 1. A person having an interest in the child provides information suggesting that the child is an Indian child; 2. The residence of the child, the child’s parents, or an Indian custodian is in a predominantly Indian community; or 3. The child or family has received services or benefits from a tribe or services that are available to Indians, such as the Indian Health Service.
<p>Active Efforts (25 USC § 1912(d); CRC 1439(i)(4), (l))</p> <p>To place an Indian child out of the custody of a parent, Indian custodian, or Indian guardian or to terminate parental rights, the court must find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts were unsuccessful. The court must consider the prevailing social and cultural conditions of the Indian child’s tribe. Efforts to provide services must include attempts to use available resources of extended family members, the tribe, Indian social service agencies, and individual Indian caregivers.</p>
<p>Burden of Proof (25 USC § 1912(e); CRC 1439(a)(10), (i)(1), (j)(1), (m)(1))</p> <p><u>Foster Care Placement or Guardianship:</u> <i>Clear and convincing evidence</i>, including testimony of a qualified expert witness.</p> <p><u>Termination of Parental Rights:</u> <i>Proof beyond a reasonable doubt</i>, including testimony of a qualified expert witness.</p>
<p>Qualified Expert Witness Testimony (25 USC § 1912(e); CRC 1439(a)(10), (i)(1), (j)(1), (m)(1))</p> <p>The testimony of a qualified expert witness that continued custody with the parent or Indian custodian or Indian guardian is likely to cause serious emotional or physical damage is required prior to the court ordering: foster care or adoptive placement, establishment of a guardianship or termination of parental rights. A qualified expert witness is a person qualified to address this issue and persons most likely to be considered such an expert are:</p> <ol style="list-style-type: none"> 1. Member of a tribe with knowledge of Indian family organization and child rearing; 2. Lay expert with substantial experience in Indian child and family services and extensive knowledge of the social and cultural standards and child-rearing practices of Indian tribes, if possible the child’s tribe; 3. Professional person having substantial education and experience in Indian child’s and family services and in the social and cultural standards of Indian tribes , if possible the child’s tribe; 4. Professional person having substantial education and experience in the area of his or her specialty.

Placement Preferences and Standards (25 USC § 1915; CRC 1439(k))

The following order of preference must be followed in all foster care and adoptive placement, absent good cause to the contrary. Placement standards must be the prevailing social and cultural standards of the Indian community in which the parent or extended family member resides, or with which the parent or extended family member maintains social and cultural contacts. The preferences and wishes of the Indian child and the parent must be considered, and weight must be given to a consenting parent's request for anonymity. The tribe, by resolution, may establish a different preference order, which must be followed if it provides for the least restrictive setting. An Indian child may be placed in a non-Indian home only if the court finds that a diligent search has failed to locate a suitable Indian home. A record of each placement of an Indian child must be maintained by the state.

Foster or Preadoptive Placements: Must be in the least restrictive setting, within reasonable proximity to the Indian child's home, and capable of meeting any special needs of the Indian child.

Placement preference must be given in the following order:

1. To a member of the Indian child's extended family;
2. To a foster home licensed or approved by the Indian child's tribe;
3. To a state or county licensed certified Indian foster home;
4. To a children's institution approved by the tribe or operated by an Indian organization and offering a program designed to meet the Indian child's needs.

Adoptive Placements: Preference must be given in the following order:

1. To a member of the Indian child's extended family;
2. To other members of the Indian child's tribe;
3. To other Indian families.

Good Cause to Deviate from the Placement Preferences (25 USC § 1915; CRC 1439(k))

The court may modify the preference order only for good cause, which may include the following considerations:

1. Requests of the parent or Indian custodian or Indian guardian;
2. Requests of the Indian child;
3. Extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness; and
4. Unavailability of suitable families based on a diligent effort to identify families meeting the preference criteria.

The party requesting a different order has the burden of establishing good cause.

Examination of Reports and Documents (25 USC § 1912(c); CRC 1439(h))

The parent, Indian child, Indian custodian, and tribe, as well as their respective attorneys, have the right to examine all court documents related to the dependency case.

Full Faith and Credit (25 USC § 1911(d))

Full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe is required.

Adoption (25 USC §§ 1917, 1951; CRC 1439(p))

The court must provide the Secretary of the Interior with a copy of any final decree or order in any Indian child adoptive placement, including:

1. Name and tribal affiliation of the child;
2. Names and addresses of the biological parents;
3. Names and addresses of the adoptive parents;
4. Identity of any agency having files or information relating to such adoptive placement; and
5. Any confidential parent affidavits.

At the request of an adopted Indian child over age 18, the adoptive or foster parents, or the tribe, the Secretary must disclose information necessary for purposes of enrollment or any rights or benefits associated with membership in the tribe. If the documents contain a confidential parent affidavit, the Secretary must certify to the tribe the information necessary for enrollment. The court must provide information to any Indian individual, age 18 or older, who was the subject of an adoptive placement, of the individual's tribal affiliation, biological parents, and other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe. Forms ADOPT-225 & 226 are required for voluntary adoptions.

Jurisdiction and Transfer (25 USC § 1911(a); CRC 1439(c))

Exclusive Jurisdiction: If the Indian child resides or is domiciled on a reservation that exercises exclusive jurisdiction, the petition must be dismissed.

Concurrent Jurisdiction: If the Indian child is not domiciled or residing on a reservation that exercises exclusive jurisdiction, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings. If the tribe does not request transfer, the juvenile court retains jurisdiction and must comply with ICWA.

Invalidate Proceedings (25 USC § 1914)

If it is determined that ICWA applies, the Indian child, a parent, an Indian custodian, or the child's tribe may petition any court of competent jurisdiction to invalidate the proceedings based on one of the following violations: jurisdiction; notice; appointment of counsel; examination of reports or other documents; active efforts; foster care placement standards and findings to support such orders; termination of parental rights standards and findings to support such orders; and standards for voluntary termination.